LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 5 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

NO. 701

WILLIAM OTHAR KITCHENS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JAMES W. WATTS
P. O. Box 401
Milledgeville, Georgia
Attorney for Petitioner

INDEX

	Page No.
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statutes and Federal Rules Involved	2
Statement of the Case	3
Reasons for granting the writ	4
Conclusion	6
Certificate of Service	6
Appendix	8
Opinion	8
Judgment	9
Statutes	9

CITATIONS.

Contee v. United States, 215 F. 2d 324	4
Taylor v. United States, 286 U.S. 1	4
Chapman v. United States, 365 U.S. 610	5
Wrightson v. United States, 222 F. 2d 556	6

STATUTES AND RULES

Section 5002 (b) (1) and Section 5642 Internal Revenue Code of 1954	3, 9
Rule 41 (e) Federal Rules of Criminal Procedure	2

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

WILLIAM OTHAR KITCHENS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, William Othar Kitchens, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on the 3rd day of November, 1961.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R 148) is reproduced in the Appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 3rd day of November, 1961 (R 149). Petitioner filed a petition for a rehearing on the

24th day of November, 1961 (R 150), which, after consideration, was denied by the Court of Appeals without opinion on the 6th day of December, 1961 (R 153). On January 2, 1962 the Supreme Court of the United States issued an order extending the time for petitioner to file petition for writ of certiorari to and including January 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Appellant was indicted, tried and convicted on a one-count indictment charging violation of the Internal Revenue Laws relating to liquors. In the testimony of one of the prosecuting witnesses it appeared that an illegal search had been made of the premises, later alleged to have been sub-leased to the defendant, instead of a consent search as stated in the affidavit of the prosecuting witness. The Court refused to allow counsel to examine the witness in regard to the search.

The question presented is whether the Court should have allowed counsel for the defendant the right to examine the witness in regard to this search to determine if a motion to suppress could be made when it appeared that the defendant was not aware of the grounds for a motion to suppress prior to the testimony of this witness.

STATUTES AND FEDERAL RULES INVOLVED

Rule 41 (e) of the Federal Rules of Criminal Procedure, pertinent portion of which reads as follows:

"The motion shall be made before trial or hearing, unless the opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing."

Section 5008 (b) (1) and Section 5642 Internal Revenue Code of 1954 are set forth in the Appendix.

STATEMENT OF THE CASE

Appellant was tried and convicted on a one-count indictment charging violation of the Internal Revenue Laws for transporting and possessing liquors.

A federal revenue officer, one of the prosecuting witnesses, filed an affidavit stating that the premises of J. T. Taylor had been searched after Taylor had given his consent and a large quantity of liquor was found. Relying on this affidavit, counsel for the defendant made no motion to suppress the evidence before the trial of the case.

From the testimony of this officer during the trial it appeared that the officer had made a search of the premises of Taylor before obtaining his consent. After this testimony of the officer Taylor testified that these premises had been sub-leased to the defendant and were under the control of the defendant.

The Court refused to allow counsel for the defendant to examine the federal revenue officer to determine if this evidence should be suppressed since it appeared that a prior illegal search of the premises had been made and to

determine whether or not Taylor had the right to consent to this search.

REASONS FOR GRANTING THE WRIT

1. The ruling in this case is contrary to the holding in the case of *Contee* v. *United States*, 215 F. 2d 324 at page 327 where Contee's Attorney had stated that he was not aware of the seized evidence. This statement by counsel, so held the Court, satisfied, prima facie at least, the provision of the rule allowing a motion to be made during trial if the defendant "was not aware of the grounds for the motion." In the Contee case the Court made no inquiry to test the validity of counsel's statement but denied the motion without further question. Even though some element of neglect on the part of Contee's counsel might have been in the case, such was not sufficient to deprive appellant of his right to have the admissibility of the evidence questioned. As the Court said: "But under the circumstances we must give the accused the benefit of the doubt, and hold that the Court's preemptory rejection of counsel's statement was erroneous."

2. The ruling in this case is also different from the holding in the case of *Taylor v. United States*, 286 U.S. 1, 76 L. Ed 951. In the Taylor case officers went to the premises of the defendant, smelled whiskey and looked "through a small opening" and saw many cardboard boxes which they thought probably contained jars of whiskey. Then they entered. The search was held to be unreasonable. Likewise when the officers in the instant case looked "through a crack over the door" and saw jars on the side (R. 52) at a time before they had ever talked to the lessee of the prem-

ises, they brought themselves within the ruling of Taylor, supra. Absent any showing of a bona fide, though later, consent search on the part of the lessee, that seach would be unreasonable and a subsequent seizure using the information so acquired could not be distinguished nor separated from the initial faulty beginning. Search and seizure are not easily isolatable but are bound together by one sole purpose and are incapable of being untied.

The Court below in refusing the appellant the opportunity to go into and question the consent supposedly given by Taylor subsequent to the search of the officers and the right of Taylor to give such consent and the reasonableness or unreasonableness of this search deprived appellant of a substantial right under the circumstances in this case. The net effect was to permit the introduction of evidence against appellant which may have been illegally seized.

3. The ruling in this case is also contrary to the holding in the case of *Chapman* v. *United States*, 365 U.S. 610 in which the Court held that a landlord did not have a right to authorize officers to search the premises of his tenant as in the instant case where Taylor authorized the officers to seach the chicken house that he later testified had been sub-leased by him solely to the defendant. Prior to the testimony of Taylor, the defendant did not know that Taylor would contend that any part of the premises had ever been sub-leased to the defendant.

"The appellant invoked a constitutional right and we are dealing with the constitutional question. We are not dealing with a mere error of law occurring in the course of trial

and which can be disregarded as harmless." *Wrightson* v. *United States*, 222 F. 2d. 556 at pages 560 and 561.

CONCLUSION

The serious question of public policy and individual rights involved here and the effect of the decision below, if unreversed, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

For these reasons and the reasons set forth above, it is respectfully submitted that the petition for writ of certiorari should be granted.

CERTIFICATE OF SERVICE

GEORGIA, BALDWIN COUNTY

Personally appeared before the undersigned attesting officer James M. Watts, who, after first being duly sworn, on oath says that he is the counsel for the appellant in the foregoing case and that he has served the within petition (1) by mail upon the Solicitor General, Department of Justice, Washington 25, D. C. by depositing the same in a United States Post Office with sufficient air mail postage attached, addressed to him at his post office address, in accordance with Rule 33 (1), Supreme Court Rules, and (2) by mail upon Honorable Floyd M. Buford, United States Attorney, Middle District of Georgia, Post Office Building, Macon, Georgia, the attorney of record who represented the United States in the Court whose judgment is sought to be reviewed, by depositing the same in a United States Post Office with sufficient first class postage attached, ad-

dressed to him at his post office address, in accordance with Rule 33 (1), Supreme Court Rules.

This 17th day of January, 1962.

JAMES M. WATTS.
James M. Watts
Post Office Box 401
Milledgeville, Georgia

Sworn to and subscribed before me:
Mary G. Wyatt
Notary Public, Baldwin County, Georgia

(S E A L)

CERTIFICATE OF GOOD FAITH

I hereby certify that the foregoing Petition for Rehearing is filed in good faith and not for the purpose of delay.

(Signed) JAMES M. WATTS

APPENDIX

OPINION
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,990

WILLIAM OTHAR KITCHENS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(November 3, 1961)

Before TUTTLE, Chief Judge, CAMERON and BROWN, Circuit Judges.

PER CURIAM: It appearing that although no motion to Suppress the evidence found by the alleged illegal search was made prior to trial, such motion was made and passed upon by the trial court at the trial. The procedure followed fully complies with the requirements of Rule 41 (e), Federal Rules Criminal Procedure. We find no error in the

manner in which this matter was handled by the trial court or in his decision thereabout.

No other errors appearing, the judgment is

AFFIRMED.

JUDGMENT

Extract from the Minutes of November 3, 1961

WILLIAM OTHAR KITCHENS
versus No. 18,990
UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and the same is hereby, affirmed.

STATUTES

26 U.S.C.A. 5008 (b) Stamps for containers of other distilled spirits —

(1) Requirements — No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto in such manner as to be broken on opening the container, a stamp evidencing the tax or indicating compliance with the provisions

of this chapter. The provisions of this subsection shall not apply to:—

(A) distilled spirits placed in containers for immediate consumption on the premises or for preparation for such consumption;

(B) distilled spirits in bond or in customs custody;

(C) distilled spirits in immediate container required to be stamped under subsection (a) or under other provisions of internal revenue or customs law and regulations;

(D) distilled spirits in actual process of rectification, blending, or bottling, or in actual use in process of manufacture;

(E) distilled spirits on which no internal revenue tax is required to be paid or which are bottled especially for export with benefit of drawback;

(F) distilled spirits not intended for sale; or for use in the manufacture or reproduction of any article intended for sale; or

(G) any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery in the ordinary course of its business as a common carrier.

26 U.S.C.A. 5642. Penalties for transporting, possessing, etc. distilled spirits in unstamped containers or counterfeiting of stamps, etc.

Any person who violates any provision of section 5008 (b), or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any stamp made or used under this section, or who uses, sells, or has in his possession any such forged, altered, or counterfeited stamp, or any plate or die used or which may be used in the manufacture thereof, or any stamp required to be destroyed by such section, or who makes, uses, sells, or has in his possession any such imitation of the paper used in the manufacture of any such stamp, or who reuses any stamp required to be destroyed by such section, or who places any distilled spirits in any bottle which has been filled and stamped under such section without destroying the stamp previously affixed to such bottle, or who affixes any stamp issued under this section to any container of distilled spirits on which any tax due is undetermined or unpaid, or who makes any false statements in any application for stamps under such section, or who has in his possession any such stamps obtained by him otherwise than as provided in section 5008 (b) (2), shall on conviction be punished by a fine of not more than $1,000, or by imprisonment at hard labor for not more than 5 years, or both. Any officer authorized to enforce any provision of law relating to internal revenue stamps is authorized to enforce this section and section 5644 (relating to the bottling of distilled spirits in bond.)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Rule involved	2
Statement:	
1. The crime	3
2. The motion to suppress evidence	4
3. The motion for rehearing in the court of appeals	5
Argument	6
Conclusion	9

CITATIONS

Cases:	
Chapman v. *United States*, 365 U.S. 610	9
Contee v. *United States*, 215 F. 2d 324	7
Segurola v. *United States*, 275 U.S. 106	7
Taylor v. *United States*, 286 U.S. 1	8
United States v. *Romero*, 249 F. 2d 371	7
United States v. *Salli*, 115 F. 2d 292	7
United States v. *Sansone*, 231 F. 2d 887, certiorari denied, 351 U.S. 987	7
Statutes and rule:	
26 U.S.C. 5205(a)(2)	3
26 U.S.C. 5604(a)	3
Rule 41(e), F.R. Crim. P	2, 6

631163—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 701

WILLIAM OTHAR KITCHENS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 148; Pet. App. 8–9) is reported at 295 F. 2d 508.

JURISDICTION

The judgment of the court of appeals was entered on November 3, 1961 (R. 149; Pet. App. 9). A petition for rehearing was denied on December 6, 1961 (R. 153). On January 2, 1962, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 25, 1962, and on that date, Mr. Justice Black further extended the time for filing a petition for a writ of certiorari to and including February 4, 1962. The petition for a writ of certiorari was filed on Monday, February 5, 1962. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial court abused its discretion in refusing to allow petitioner to examine a federal agent concerning the legality of a search, when no pretrial motion to suppress had been filed.

RULE INVOLVED

Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity thereof did not exist or the defendant was

not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

An indictment filed in the United States District Court for the Middle District of Georgia charged petitioner and Joseph T. Taylor with transporting and possessing whiskey in an unstamped container, in violation of 26 U.S.C. 5205(a)(2) and 5604(a) (R. 2). Taylor pleaded guilty and testified as a government witness at petitioner's jury trial. Petitioner was convicted and sentenced to imprisonment for three years (R. 142).

1. *The crime.*—In February 1960, Joseph T. Taylor agreed to allow petitioner to store moonshine whiskey in a chicken house adjoining the garage at Taylor's residence (R. 75). Periodically in the nighttime, petitioner, after identifying himself at the Taylor house, would transfer moonshine whiskey which he had brought by vehicle to this shed. He was assisted occasionally in the unloadings by Taylor and his brother-in-law (R. 94, 97–98, 100, 103). Between May 1960 and August 1960, a paid informer of the Alcohol and Tobacco Tax Unit observed petitioner transfer objects between a vehicle and the shed (R. 18–22, 28). On August 29, 1960, the informer notified federal agents that he had located petitioner's liquor storehouse (R. 46). About 11 a.m. on November 4, 1960, federal and state agents went to Taylor's home (R. 37, 42–43). Upon being informed by Mrs. Taylor that her husband was absent, they departed. They came back and, finding that Taylor still had not re-

turned home, told Mrs. Taylor that they had information that moonshine whiskey was being stored on the premises. Mrs. Taylor replied that it was in the shed (R. 43–44, 52). The agents then went to the shed and, looking through a crack in the door, saw stacked fruit jar cases (R. 52). When Taylor arrived shortly thereafter, the officers told Taylor that they had reports that liquor was stored there, but that they had no search warrant. Taylor consented to a search of the shed.[1] He accompanied them to the shed, took a key from his pocket and opened the lock on the shed door (R. 37, 40, 50–51, 90, 93–94). The agents found 1037 ½ gallons of non-taxpaid whiskey in the shed (R. 38). At the trial, petitioner denied that he had used the shed (R. 108–120).

2. *The motion to suppress evidence.*—Petitioner failed to file a motion to suppress evidence before trial. Petitioner, in his cross-examination of federal agent Williams at the trial, brought out testimony that, prior to the raid, the agents had looked into the shed through a crack in the door and testimony that Williams had believed that the residence was rented to Taylor, rather than to Mrs. Taylor (R. 52). When petitioner asked Williams for the second time if he had a search warrant, the court interrupted the cross-examination, questioning the relevancy of such an inquiry (R. 52–53). Petitioner then requested leave to move orally to suppress the evidence concerning the search of

[1] Petitioner conceded below and does not here dispute Taylor's consent (R. 58–61). The complete conversation between the agents and Taylor is not in the record. The court sustained petitioner's objection to the conversation on the ground of hearsay (R. 37–38, 39).

the shed (R. 53–55). Petitioner's position was that, according to the evidence, before Taylor, the lessee, had consented to the search, the agents had looked through a crack into the shed and had seen fruit jar cases, and that this action had invalidated Taylor's consent (R. 54–61). Petitioner attempted to excuse his failure to file a motion to suppress before trial on the ground that the complaint, upon which the warrant for Taylor's arrest had been based, stated only that Taylor had given his permission to the search after being advised of his rights concerning a search warrant (R. 55).[2] The trial judge refused to entertain the motion, holding that petitioner's counsel knew prior to trial that the government planned to rely on a consent search and that petitioner should have challenged the consent prior to the impaneling of the jury (R. 58–61).

3. *The motion for rehearing in the court of appeals.*—In his motion for rehearing in the court below, petitioner claimed that Taylor had had no authority to consent to the search of the shed because he had rented it to petitioner (R. 150–152). Taylor had testified that he had "rented" petitioner the chicken house as a storage place for moonshine whiskey for the sum of $10 per week which amount was to have been applied to the payment of a truck purchased from petitioner (R. 75, 79, 80–81). This testimony had been adduced after petitioner's oral

[2] The complaint stated in part (R. 12): "I explained Taylor's rights to him regarding a Federal Search Warrant and his rights to waive. Taylor waived his rights to a Federal Search Warrant and inside a shed alongside his garage there was 1037 ½ gallons of nontaxpaid whiskey * * *."

motion to suppress. Petitioner had not renewed his motion on this ground.

ARGUMENT

1. Rule 41(e), F.R. Crim. P. (*supra*, pp. 2–3) provides that a motion to suppress evidence "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." The trial judge did not abuse his discretion in refusing to entertain a motion to suppress evidence made during the trial, and more specifically in refusing to permit petitioner to examine federal agent Williams further concerning the legality of the search.

Although petitioner concedes that he had sufficient opportunity to file the motion before trial (R. 60–61), he argues that he was not aware of the ground for the motion—the action of the agents in peering through the crack of the shed—because he relied upon the statement in the formal complaint on file that Taylor had knowingly waived his right to a search warrant. But the statement in the complaint does not excuse petitioner's failure to move for suppression before trial. It was not misleading. Petitioner's counsel should have known that the facts leading up to Taylor's waiver might bear upon its validity and that his conclusion concerning its legality might differ from that of the complainant. Moreover, the indictment specifically charged petitioner with possession and informed him of the seized evidence, and the complaint

informed him of the place of seizure and of Taylor's consent to the search. Petitioner was therefore aware that he had standing to file a motion to suppress (R. 54). Since no adequate reason for the failure to file the motion was given, the trial court properly refused to permit further examination of agent Williams on this issue. See *Segurola* v. *United States*, 275 U.S. 106, 111–112; *United States* v. *Romero*, 249 F. 2d 371 (C.A. 2); *United States* v. *Sansone*, 231 F. 2d 887, 892 (C.A. 2), certiorari denied, 351 U.S. 987; *United States* v. *Salli*, 115 F. 2d 292 (C.A. 2).[3]

2. In any event, sufficient facts were developed to establish the legality of the search and seizure. They show reasonable police conduct in looking into the shed as well as in the subsequent entry. The federal agents made no attempt to enter the shed illegally. Initially when they confronted Mrs. Taylor, in the absence of her husband, they left the premises without making any search. Upon their return, again finding Taylor absent, they were told by his wife that the illegal liquor was in the shed. The agents at that time merely peered into its interior through a crack in the door. When Taylor appeared, the officers did not demand entry and did not attempt to break into the shed. Rather, they only entered the shed after Taylor consented and opened the door with his key. Taylor gave his consent after waiving his right to have the

[3] *Conter* v. *United States*, 215 F. 2d 321 (C.A. D.C.) (see Pet. 4), does not support petitioner. In that case, counsel was not aware of the seized evidence. Counsel's lack of knowledge may be explained by the fact that the defendant had been adjudged mentally incompetent shortly after his apprehension and had spent nearly a year in a mental institution.

agents obtain a search warrant. That this consent was not coerced is manifested by the fact that the agents permitted Taylor to go to his place of employment and surrender to the authorities on the following day (R. 91).[4]

3. The claim that Taylor could not consent because he had subleased the property to petitioner is both untimely and without merit. No objection on this ground was made at the trial and no renewed motion to suppress was made after Taylor's testimony. This afterthought was first mentioned in the court of appeals, and comes too late for consideration.

Moreover, on the merits, the evidence shows that Taylor did have authority to open the shed with his key and consent to the search. There was no real lease of the shed. Taylor, as a coconspirator, had agreed to permit petitioner to use the shed for the specific purpose of storing contraband whiskey. The manner of compensating Taylor for his illegal action by a payment from petitioner denominated rent did not give petitioner any cognizable legal interest in the premises. That Taylor had not surrendered all control over the shed is demonstrated by two facts: (1) Taylor had possession of a key to a lock which had been placed on the shed by petitioner; (2) petitioner,

[4] *Taylor* v. *United States*, 286 U.S. 1, cited by petitioner (Pet. 4–5) is inapposite. The agents in that case did not secure any consent prior to their entry. Rather, they broke into a garage in the early morning hours after they had smelled the odor of whiskey and had looked through a small opening in the garage.

in each instance that he entered the shed, first notified the Taylors.[5]

CONCLUSION

For the foregoing reasons, it is respectively submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

MARCH 1962.

[5] The present case is materially different from *Chapman* v. *United States*, 365 U.S. 610, on which petitioner relies (Pet. 5). In that case, the landlord who rented a house for dwelling purposes broke into the home with federal agents because he believed that it was being used for an illegal purpose. The landlord had surrendered all control over the dwelling pursuant to a legal agreement and did not know that his tenant was conducting an illegal business. In the present case, there was no house, no legal rental agreement, and no surrender of control by Taylor.

U.S. GOVERNMENT PRINTING OFFICE: 1962